161

(3)

No. 09-1098

Supreme Court, U.S.
FILED
MAY 14 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH A. LEVINE,

Petitioner,

vs.

THE GREECE CENTRAL SCHOOL DISTRICT, MONROE-2 ORLEANS BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DAVID MANCUSO, KATHLEEN MADONIA, DONALD NADOLINSKI, DEBORAH HOEFT, AMY PERISKY, AND KENNETH MERKEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

HARRIS BEACH PLLC
DAVID W. OAKES, ESQ.
Attorneys for Respondents Greece Central School District, Donald Nadolinski, Deborah Hoeft, Amy Perisky, and Kenneth Merkey
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
doakes@harrisbeach.com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's Opinion affirming the District Court's dismissal of Petitioner's Complaint does not conflict with a decision of this Court or a Court of Appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's Opinion affirming the District Court's dismissal of Petitioner's Complaint does not implicate an important federal question of law that should be settled by this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. Petitioner's Complaint	2
II. The Western District of New York Dismisses Petitioner's Complaint	3
III. The Second Circuit Affirmed the Dismissal of Petitioner's Complaint	3
REASONS FOR DENYING THE PETITION	4
I. The Second Circuit's Decision Does Not Conflict with a Decision of this Court or any Court of Appeals	5
II. Petitioner's Complaint Does Not Present an Important Issue of Federal Law that This Court Should Decide	6
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Mosely v. Bd. of Educ., 434 F.3d 527 (7th Cir. 2006) 4, 5, 6

Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478 (2d Cir. 2002) 8

STATUTES

20 U.S.C. §1415(c)(1)(C) 8

20 U.S.C. §1415(i) 7

8 N.Y.C.R.R. §200.5(f)(1) 8

RULES

Fed.R.Civ.P. 12(b)(1) 3

Fed.R.Civ.P. 12(b)(6) 3, 5

Sup. Ct. R. 10 ..... 1, 4

Sup. Ct. R. 10(a) 1, 6

Sup. Ct. R. 10(c) 1

INTRODUCTION

Petitioner, Joseph Levine (the "Petitioner"), has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted (the "Petition"). Sup. Ct. R. 10. Petitioner has not, and cannot, make the required showing that: (1) the Second Circuit's November 12, 2009 Summary Order and Opinion (the "Opinion") conflicts with a decision of this Court or any Court of Appeals; or (2) the Second Circuit decided an important federal question of law that should be settled by this Court. Sup. Ct. R. 10(a), (c).

According to Petitioner, there is a split between the Circuits with respect to whether the failure to exhaust administrative remedies under the Individuals With Disabilities Education Act ("IDEA"): (a) divests federal courts of subject matter jurisdiction; or (b) like a claims processing rule, provides defendants with only an affirmative defense. (Petition, pp. 23-24). The Second Circuit's Opinion, however, did not rely on lack of subject matter jurisdiction in affirming the dismissal of Petitioner's Complaint. (Opinion, pp. 4, 8). Rather, the Second Circuit held that regardless of whether failure to exhaust administrative remedies divests federal courts of subject matter jurisdiction, dismissal was still appropriate because Petitioner's Complaint admitted that he failed to exhaust administrative remedies. (*Id.*). Therefore, the decisions of other Circuit Courts as to the characterization of the exhaustion requirement are irrelevant and are not in conflict with the Second Circuit's Opinion.

Moreover, Petitioner's Complaint does not present "an important issue of federal law" that this Court should decide. The Second Circuit's Opinion is fact specific – the court ruled that dismissal was warranted because there was no possibility that Petitioner's Complaint could be amended to allege facts demonstrating that Petitioner satisfied the IDEA's exhaustion requirement. The Second Circuit declined to decide any issues beyond that limited factual question.

Accordingly, Petitioner has failed to meet his burden of demonstrating that there exists compelling reasons for this Court to grant the Petition. The Petition should be denied in all respects.

STATEMENT OF THE CASE

I. Petitioner's Complaint.

Petitioner's Complaint against Respondents contains six causes of action arising out of the special education and related services he received during the 2005-2006, 2006-2007, and 2007-2008 school years. (A 10-23). In almost all respects, the Complaint was identical to an earlier complaint filed by Petitioner against the Respondents that he had voluntarily withdrawn. (A 129-53). The only material difference between the prior complaint and the current Complaint is that the current Complaint admits that Petitioner did not exhaust his administrative remedies and alleges that exhaustion would have been

futile because: (1) Respondents had a long history of failing Petitioner; (2) exhaustion would have resulted in "innumerable administrative meetings"; and (3) Petitioner was not informed of the exhaustion requirement. (A 23-29).

II. The Western District of New York Dismisses Petitioner's Complaint.

Respondents moved to dismiss Petitioner's Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) on the grounds that Petitioner admittedly failed to exhaust administrative remedies under the IDEA.[1] (A 121-22). By Decision and Order dated February 4, 2009, the Western District of New York dismissed Petitioner's Complaint in its entirety pursuant to Rule 12(b)(1) for failure to exhaust his administrative remedies. (A 372-92). The court further ruled that Petitioner had failed to allege any facts that supported his argument that exhaustion would have been futile. (A 381-91).

III. The Second Circuit Affirmed the Dismissal of Petitioner's Complaint.

The Second Circuit Court of Appeals affirmed. In doing so, the Second Circuit found it unnecessary to decide whether the IDEA's exhaustion requirement is

---

[1] The Petition incorrectly states that Petitioner "allegedly failed to exhaust administrative remedies." (Petition, p. 7).

jurisdictional or a claims processing rule. As explained by the Second Circuit, "even if failure to exhaust administrative remedies under the IDEA does not divest the federal courts of subject matter jurisdiction, [Petitioner's] complaint contains no allegations sufficient to demonstrate that his failure to comply with this mandatory statutory requirement should be excused." (Opinion, p. 8). Where, as here, a "complaint on its face shows that there is no possibility that it could be amended to allege facts that, if true, would demonstrate that the plaintiff satisfied the exhaustion requirement, failure to exhaust is a proper ground for a motion to dismiss." (Opinion, p. 4). Significantly, the Second Circuit's Opinion relies, in part, upon *Mosely v. Bd. of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006), the case asserted by Petitioner to show a conflict between the Circuits. (Petition, pp. 23-25).

REASONS FOR DENYING THE PETITION

The Second Circuit's decision does not conflict with a decision of this Court or any Court of Appeals, nor does it implicate an important federal question of law that should be decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Second Circuit's Decision Does Not Conflict with a Decision of this Court or any Court of Appeals.

Petitioner claims that the Second Circuit's Opinion conflicts with the Seventh Circuit's decision in *Mosely*, which treats the IDEA's exhaustion requirement as a claims processing rule, but it does not.

Contrary to Petitioner's argument, the Second Circuit declined to reach the issue of whether the IDEA's exhaustion requirement is a claims processing rule or jurisdictional. The Second Circuit expressly found that it "need not address whether [the exhaustion requirement] is jurisdictional" because even if exhaustion was not jurisdictional, Petitioner's Complaint must still be dismissed. (Opinion, pp. 3, 4, and 8). In reaching this conclusion, the Second Circuit relied partly on the Seventh Circuit's decision in *Mosely*.

Indeed, a review of *Mosely* shows that even the Seventh Circuit would have affirmed the dismissal of Petitioner's Complaint. In *Mosely*, the Seventh Circuit expressly recognized that, even if considered an affirmative defense, the courts will grant a Rule 12(b)(6) motion for the failure to exhaust administrative remedies where "there is no way any amendment could salvage the claim." *Id.* at 533. *Mosely* did not dismiss the complaint only because there was "nothing on the face of [the plaintiff's] complaint that compel[led] a conclusion that she failed to exhaust"

her administrative remedies. *Id.* Unlike *Mosely*, however, it is undisputed that Petitioner here failed to exhaust administrative remedies in as much as the Complaint specifically admits the failure and contains an entire section unsuccessfully alleging that exhaustion would have been futile. (A 23-29).

Neither does the Second Circuit's decision affirming dismissal of Petitioner's Complaint conflict with an opinion of this Court. As Petitioner concedes, this Court has never ruled on this issue. (Petition, p. 11).

Because: (1) this Court has not ruled on the issue; and (2) the Second Circuit's Opinion not only fails to conflict with the Seventh Circuit, but actually cites it in support of its decision to affirm the dismissal of the Complaint, Petitioner fails to demonstrate any compelling reason for this Court to grant the Petition under Supreme Court Rule 10(a).

II. Petitioner's Complaint Does Not Present an Important Issue of Federal Law that This Court Should Decide.

Throughout the Petition, Petitioner attempts to establish that the Court's grant or denial of review of the Second Circuit's Opinion will have a significant impact on the rights of students, parents, and school districts under the IDEA. Petitioner argues that "ensuring a consistent approach amongst the Circuit Courts for the enforcement of [the IDEA's] guarantee of public education is a matter of imperative public

importance." (Petition, p. 10). Likewise, Petitioner claims that granting his Petition "would give educators and parents nationwide much-needed guidance as a Supreme Court precedent would create a consistent approach to the exercise of subject matter jurisdiction in cases involving education for children with disabilities." (*Id.* at p. 26). These arguments are not credible.

As noted above, the Second Circuit's decision rests upon the specific facts of Petitioner's case – holding that Petitioner's Complaint shows that there is no possibility that it could be amended to allege facts that, if true, would demonstrate that Petitioner satisfied the exhaustion requirement. Thus, Petitioner presents a fact specific inquiry only – not an "important issue of federal law."

Moreover, the classification of the IDEA's exhaustion requirement has a minimal effect on the administration of the IDEA. Petitioner readily admits that "[i]t is well-settled precedent that a plaintiff typically must exhaust all available administrative procedures before filing suit in federal court under the auspices of IDEA." (Petition, p. 12). The exhaustion requirement is also specifically included in the statute. 20 U.S.C. §1415(i). Indeed, exhaustion of the administrative process has always been paramount to the successful operation of the IDEA. This is true because, among other things, the administrative process "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational

issues, furthers development of a complete factual record, and promotes judicial efficiency." *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002). The importance of the administrative process, together with the "well-settled precedent" requiring exhaustion, invariably leads to the conclusion that the classification of the exhaustion requirement will have no bearing on the majority of cases. In short, the exhaustion requirement is explicit and well-known.

Petitioner's argument that granting the Petition would provide "educators and parents nationwide much-needed guidance" is unsupported by fact or law. Significantly, all parents of students receiving services under the IDEA are already provided notice of the administrative remedies available under the IDEA pursuant to 20 U.S.C. §1415(c)(1)(C). Moreover, many parents receive even far more guidance than that required by the provisions of the IDEA as a result of various state education laws and regulations. Petitioner, for example, received an approximately forty-four page "Procedural Safeguards Notice" pursuant to 8 N.Y.C.R.R. §200.5(f)(1). (A 186-230). That notice included notification of the exhaustion requirement. (A 215-16).

Finally, not only would granting the Petition have little effect on the general operation and administration of the IDEA and the rights of the individuals and institutions it covers, it would also have no effect on the final outcome of Petitioner's case. As already discussed, the Western District

dismissed the Complaint for lack of subject matter jurisdiction and the Second Circuit affirmed that dismissal on the grounds that even if exhaustion was not jurisdictional, Petitioner's admitted failure to exhaust was fatal to his claims. Accordingly, even if this Court granted the Petition and then ruled that exhaustion of administrative remedies is not jurisdictional, it would have no effect on Petitioner's claims against Respondents.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

HARRIS BEACH PLLC
DAVID W. OAKES, ESQ.
Attorneys for Respondents Greece Central School District, Donald Nadolinski, Deborah Hoeft, Amy Perisky, and Kenneth Merkey
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
doakes@harrisbeach.com